

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

LESLIE J. SHAW,

Plaintiff,

v.

CITIMORTGAGE, INC.; *et al.*,

Defendants.

3:13-CV-0445-LRH-VPC

ORDER

Before the court is defendant CitiMortgage, Inc.’s (“CitiMortgage”) motion for summary judgment on plaintiff Leslie J. Shaw’s (“Shaw”) second amended complaint (Doc. #109¹). Doc. #137. Plaintiff Shaw filed an opposition (Doc. #139) to which CitiMortgage replied (Doc. #142).

I. Facts and Procedural History

This is a wrongful foreclosure and breach of contract action brought by Shaw against defendants. In 2003, Shaw obtained a residential loan from non-party Lehman Brothers Bank (“Lehman Brothers”) for a property located in Zephyr Cove, Nevada. The loan was secured by a promissory note and deed of trust in favor of Lehman Brothers. Shortly thereafter, the loan was transferred from Lehman Brothers to defendant the Bank of New York in its trust capacity.

Shaw initially made the requisite mortgage payments to non-party Aurora Loan Services (who acted as loan servicer until June 2005) and then to defendant CitiMortgage until 2011. In May

¹ Refers to the court’s docket entry number.

1 2011, Shaw and CitiMortgage allegedly entered into a loan modification agreement that reduced
2 the monthly mortgage payments for the property. In July 2011, CitiMortgage allegedly repudiated
3 the agreement and forwarded Shaw a new modification agreement. Shaw refused this new
4 agreement and in August 2011, CitiMortgage allegedly resolved Shaw's mortgage account and re-
5 booked his payments under the original May 2011 modification agreement. However, in December
6 2011, CitiMortgage again allegedly repudiated the May 2011 loan modification agreement.
7 Thereafter, Shaw refused to make any loan payments and CitiMortgage initiated non-judicial
8 foreclosure proceedings on the property.

9 Subsequently, on July 26, 2013, Shaw filed a complaint against defendants for wrongful
10 foreclosure. Doc. #1, Exhibit 1. Shaw filed an amended complaint (Doc. #52) and then a second
11 amended complaint (Doc. #109). In his second amended complaint Shaw alleges eight (8) causes of
12 action against defendants: (1) declaratory relief against defendant Bank of New York;
13 (2) declaratory relief against defendant CitiMortgage; (3) breach of contract; (4) breach of the
14 covenants of good faith and fair dealing; (5) fraudulent misrepresentation; (6) negligent
15 misrepresentation; (7) interference with prospective economic advantage; and (8) violation of the
16 Real Estate Settlement Procedures Act. Doc. #109.

17 On September 11, 2014, defendant CitiMortgage filed a motion to dismiss (Doc. #113)
18 which was granted in-part and denied in-part by the court (Doc. #128). In the court's order, the
19 court dismissed Shaw's fifth cause of action for fraudulent misrepresentation and sixth cause of
20 action for negligent misrepresentation. *See* Doc. #128. Thereafter, CitiMortgage filed the present
21 motion for summary judgment on the remaining claims in Shaw's second amended complaint.
22 Doc. #137.

23 **II. Legal Standard**

24 Summary judgment is appropriate only when the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
26 genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter

1 of law.” Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together
 2 with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable
 3 to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
 4 587 (1986); *Cnty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

5 The moving party bears the burden of informing the court of the basis for its motion, along
 6 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
 7 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
 8 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could
 9 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259
 10 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

11 To successfully rebut a motion for summary judgment, the non-moving party must point to
 12 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
 13 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might
 14 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 15 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary
 16 judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding
 17 a material fact is considered genuine “if the evidence is such that a reasonable jury could return a
 18 verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla
 19 of evidence in support of the plaintiff’s position will be insufficient to establish a genuine dispute;
 20 there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at 252.

21 **III. Discussion**

22 **A. Declaratory Relief as to Defendant CitiMortgage**

23 In his complaint, Shaw seeks an order from the court declaring the initial May 2011 loan
 24 modification agreement a permanent and enforceable loan modification agreement. In contrast,
 25 CitiMortgage seeks to have the court determine that there was no valid and enforceable loan
 26 modification agreement or, in the alternative, that any such loan modification agreement was

1 extinguished when Shaw failed to make the modified loan payments after CitiMortgage agreed to
2 re-book the modification agreement in June 2012.

3 Here, the existence and validity of the loan agreement is greatly disputed by the parties. For
4 example, defendant CitiMortgage contends that it never signed the May 2011 loan agreement or
5 received any consideration for the agreement. In contrast, Shaw has proffered evidence that the
6 only signed and enforceable loan modification agreement is the May 2011 agreement that was
7 executed by both parties. As such, the court finds that there are disputed issues of material fact that
8 precludes summary judgment on this claim.

9 **B. Breach of Contract and Breach of Implied Covenants**

10 To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a
11 valid contract; (2) a breach by the defendant; and (3) damages resulting from defendant's breach.
12 *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006); *Brown v. Kinross Gold*
13 *U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008).

14 Further, under Nevada law, "[e]very contract imposes upon each party a duty of good faith
15 and fair dealing in its performance and execution." *A.C. Shaw Constr. v. Washoe County*, 784 P.2d
16 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for
17 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the
18 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and
19 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner
20 unfaithful to the purpose of the contract; and (4) the plaintiff's justified expectations were denied.
21 *See Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995) (citing *Hilton Hotels Corp. v. Butch Lewis*
22 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

23 In its motion, CitiMortgage argues that it has cured any repudiations of the alleged May
24 2011 loan modification agreement and thus, it cannot be liable for any breach of contract. Further,
25 CitiMortgage contends that Shaw is not entitled to any damages for CitiMortgage's breach because
26 Shaw has refused to perform under the loan modification agreement. Specifically, CitiMortgage

1 argues that it has repeatedly agreed at several different times prior to and during this litigation to
2 reinstate Shaw's loan and waive all late fees under the payment plan developed under the May
3 2011 loan modification agreement, but that despite its agreement to reinstate the loan, Shaw has
4 refused to make the necessary catch-up payments from December 2011. Thus, CitiMortgage
5 contends that Shaw's decision to not pay past due amounts precludes a finding that CitiMortgage
6 breached the agreement.

7 The court has reviewed the documents and pleadings on file in this matter and finds that
8 similar to Shaw's declaratory relief claim, there are disputed issues of material fact which preclude
9 summary judgment on Shaw's contract based claims. For example, Shaw has proffered sufficient
10 evidence to support that he and CitiMortgage entered into a final and binding loan modification
11 agreement in May 2011 that permanently reduced his mortgage payments and that CitiMortgage
12 repeatedly breached that agreement. Further, CitiMortgage's claim that there can be no damages for
13 its breach because Shaw has refused to make any payments since CitiMortgage's second
14 repudiation is unavailing. Evidence that CitiMortgage twice breached that agreement is sufficient to
15 raise disputed issues of fact as to whether or not CitiMortgage's offers to reinstate the loan were
16 genuine. The court finds that it was reasonable for Shaw to have refused to make additional
17 payments under the breached contract without some assurance by CitiMortgage that it was going to
18 uphold and comply with the contract. Shaw has sought such assurance with the present lawsuit. The
19 fact that Shaw is wary of believing CitiMortgage's statements and pledges prior to and during this
20 litigation is not a basis to preclude his breach of contract claim.

21 Moreover, Shaw has proffered evidence that throughout the history of his loan after
22 May 2011, CitiMortgage has acted in a manner to frustrate the purpose of the modification
23 agreement. In fact, CitiMortgage's decision to twice breach the contract and require Shaw to make
24 up any payments after its breach before first reinstating the loan is evidence that CitiMortgage's
25 conduct "deliberately countervenes the intention and spirit of the contract." *Morris v. Bank of*
26 *America*, 886 P.2d 454, 457 (Nev. 1994). Thus, based on the disputed issues of material fact, the

1 court finds that CitiMortgage is not entitled to summary judgment on Shaw's claims for breach of
2 contract and breach of the implied covenants of good faith and fair dealing.

3 **C. Interference with Prospective Economic Advantage**

4 Shaw's claim for intentional interference with prospective economic advantage relates
5 solely to CitiMortgage's alleged failure to negotiate and approve a short sale of Shaw's property. In
6 its motion, CitiMortgage contends that the court should enter judgment on this claim because a loan
7 servicer has no duty to negotiate or approve a short sale and therefore, it had no duty to approve, act
8 on, or even acknowledge the two separate short sale offers Shaw received on the property. The
9 court disagrees.

10 Generally, a loan servicer like CitiMortgage has no duty to approve a short sale. *See*
11 *Blanford v. Suntrust Mortgage, Inc.*, 2012 U.S. Dist. LEXIS 141666, *11 (D. Nev. 2012).
12 However, in this action Shaw has proffered sufficient evidence to support a finding that
13 CitiMortgage specifically requested Shaw put his home on the market as a short sale and directly
14 forward any offer to CitiMortgage's counsel, only to ignore the offers Shaw received. Thus, in
15 contrast to the *Blanford* case, CitiMortgage created the duty to consider and respond to short sale
16 offers by affirmatively requesting that Shaw list the house as a short sale. Therefore, the court shall
17 deny defendants' motion as to this claim.

18 **D. Real Estate Settlement Procedures Act**

19 In his last cause of action, Shaw alleges that CitiMortgage violated the Real Estate
20 Settlement Procedures Act ("RESPA") when it failed to provide Shaw with certain contact
21 information about his residential home loan lender upon receiving a qualified written request. *See*
22 12 U.S.C. § 2605(k)(1)(D) (entitling homeowners, upon submission of a qualified written request,
23 to the contact information for an owner or assignee of a mortgage loan for residential property. 12
24 U.S.C. § 2605(k)(1)(D). Further, Shaw alleges that CitiMortgage failed to cease reporting adverse
25 credit information to credit agencies after he filed his qualified written request. *See* 12 U.S.C.
26 § 2605(e) (requiring that a servicer cease reporting a borrower's disputed payments as adverse

1 information to any consumer reporting agency during the 60 days following the servicer's receipt of
2 a qualified written request).


3 In its motion, CitiMortgage argues that because Shaw wishes to negotiate a loan
4 modification on his non-performing loan, the relevant contact information is necessarily that of
5 CitiMortgage. As such, Shaw had all necessary information to negotiate his loan modification and
6 therefore, even if CitiMortgage did not properly respond to the qualified written request,² there was
7 no harm because Shaw had the requisite information. However, Shaw contends that he received the
8 wrong information identifying his lender including incorrect contact information, a disconnected
9 telephone number, and a non-existent e-mail address. Further, Shaw has proffered evidence
10 showing that CitiMortgage continued to report Shaw as delinquent on his loan account for the sixty
11 days after receiving his qualified written request. Therefore, the court shall deny CitiMortgage's
12 motion as to this claim.

13
14 IT IS THEREFORE ORDERED that defendant's motion for summary judgment
15 (Doc. #137) is DENIED.

16 IT IS FURTHER ORDERED that the parties shall have sixty (60) days after entry of this
17 order to prepare and file a joint proposed pretrial order with the court.

18 IT IS SO ORDERED.

19 DATED this 25th day of June, 2015.

20 
21 LARRY R. HICKS
22 UNITED STATES DISTRICT JUDGE
23
24

25 ² It is undisputed that Shaw sent a letter to the address provided to him on the notice of default and
26 election to sell. In response to that letter, CitiMortgage advised him that it would treat his letter as a qualified
written request under RESPA.